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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

15 In re:

16 INDYMAC BANCORP, INC., a
17 Delaware corporation,

18 Debtor.

Case No. CV11-02950 RGK and
CV11-2998-RGK

[Assigned to Judge R. Gary Klausner]

(1) **NOTICE OF MOTION AND
MOTION TO DISMISS;**

(2) **MEMORANDUM OF POINTS
AND AUTHORITIES**

19 INDYMAC MBS, INC., a Delaware
20 Corporation,

21 Plaintiff,

22 v.

Date: July 25, 2011
Time: 9:00 a.m.
Courtroom: 850

[Filed concurrently with Declaration of
Gretchen S. Carner and Proposed Order]

23 ACE AMERICAN INS. CO., a
24 Pennsylvania corporation, ZÜRICH
25 AMERICAN INS. CO., a Delaware
26 Corporation; TWIN CITY FIRE INS.
27 CO., a Delaware Corporation;
28 CONTINENTAL CASUALTY CO., a
Delaware Corporation; XL
SPECIALTY INS. CO., a Delaware
corporation; ARCH INS. CO., a
Delaware corporation; AXIS INS. CO.,
a Delaware Corporation; CERTAIN
UNDERWRITERS AT LLOYDS OF
LONDON, an unincorporated
association; FEDERAL INS. CO., a
New Jersey corporation; NATIONAL
UNION FIRE INS. CO. OF
PITTSBURGH, PENNSYLVANIA, a

1 Delaware corporation; LEXINGTON
 INS. CO., a Delaware corporation;
 2 CATLIN INS. CO., a United Kingdom
 corporation; MICHAEL W. PERRY;
 3 A. SCOTT KEYS; LOUIS E.
 CALDERA; LYLE E. GRAMLEY;
 4 HUGH M. GRANT; PATRICK C.
 HADEN; TERRENCE G. HODEL;
 5 ROBERT L. HUNT II; LYNDIA H.
 KENNARD; BRUCE G. WILLISON;
 6 JOHN OLINSKI; S. BLAIR
 ABERNATHY; RAPHAEL BOSTIC;
 7 SAMIR GROVER; SIMON HEYRICK;
 VICTOR H. WOODWORTH;
 8 LYNETTE ANTOSH; SCOTT VAN
 DELLEN; RICHARD KOON;
 9 KENNETH SHELLEM; WILLIAM
 ROTHMAN; JILL JACOBSEN;
 10 KEVIN CALLAN; AND ALFRED H.
 SIEGEL, as Chapter 7 bankruptcy
 11 trustee of INDYMAC BANCORP, IND.

12 Defendants.

13

14 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

15 PLEASE TAKE NOTICE that Defendant National Union Fire Insurance
 16 Company of Pittsburgh, Pa. ("National Union") hereby moves to dismiss this action
 17 brought by Plaintiff IndyMac MBS, Inc. ("IndyMac MBS") under Fed. R. Civ. P.
 18 12(b)(1) for want of subject matter jurisdiction.

19 Article III of the United States Constitution requires that this action satisfy the
 20 "Case or Controversy" requirement, which it does not, as IndyMac MBS has no
 21 standing to seek any insurance coverage declarations under the 2007-2008 National
 22 Union Policy at issue in this action.

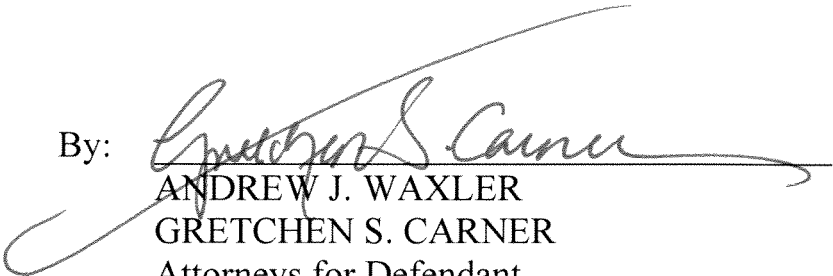
23 This motion is based upon this Notice of Motion and Motion; the
 24 accompanying Memorandum of Points and Authorities; the accompanying
 25 Declaration of Gretchen S. Carner and exhibits attached thereto; the complete files
 26 and records in this matter; oral argument of counsel; and such other and further
 27 matters as this Court may consider.

1 On June 8, 2011, the Court ordered the parties to respond to IndyMac MBS's
2 First Amended Complaint ("FAC") by June 14, 2011. This motion is brought
3 following the conference of counsel pursuant to Local Civil Rule 7-3, which was
4 completed on June 9, 2011.

5 Dated: June 13, 2011

WAXLER ♦ CARNER ♦ BRODSKY LLP

6
7
8 By:


ANDREW J. WAXLER

GRETCHEN S. CARNER

Attorneys for Defendant

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

During the relevant time, IndyMac Bancorp, Inc. (“IndyMac Bancorp”) was the ultimate corporate parent of the plaintiff here, IndyMac MBS, Inc. (“IndyMac MBS”). IndyMac Bancorp obtained from some of the defendants directors’ and officers’ liability insurance that afforded specified coverage for claims made during the March 1, 2007 to March 1, 2008 Policy Period. (Declaration of Gretchen S. Carner (“Carner Decl.”) Ex. 1, First Amended Complaint (“FAC”) ¶¶ 13, 51, 52.)¹ Prior to the expiration of the 2007-2008 policies, IndyMac Bancorp secured further insurance from a different subset of the defendants with a Policy Period of March 1, 2008 to April 1, 2009. (FAC, ¶¶ 51, 53.)

At the time it obtained these policies, IndyMac Bancorp was the parent of IndyMac Bank, F.S.B. (the “Bank”), which in turn was the parent of IndyMac MBS. (FAC, ¶ 13.) On July 11, 2008, the Office of Thrift Supervision closed the Bank and appointed the Federal Deposit Insurance Corporation as its receiver. (*Id.*) IndyMac MBS asserts that subsequently the ownership of IndyMac MBS was transferred to IndyMac Federal, F.S.B. (“IndyMac Federal”) and is now held by the federal receivership estate for IndyMac Federal. (*Id.*) On July 31, 2008, IndyMac MBS filed a petition for liquidation under chapter 7 of the Bankruptcy Code.

The instant lawsuit brought by IndyMac MBS names a number of insurers and former directors and officers of IndyMac Bancorp, and seeks wide-ranging coverage declarations under these 2007-2008 and 2008-2009 policies for 12 underlying matters. Most of these underlying matters do not involve IndyMac MBS. Specifically, IndyMac MBS seeks judicial determinations that IndyMac MBS is entitled to coverage under 2007-2008 policies for the three underlying actions in

¹ All exhibits to this motion are attached to the Declaration of Gretchen S. Carner In Support of the Motion to Dismiss filed concurrently herewith.

1 which it has been named, and that certain defendant-insurers wrongfully paid
2 uncovered, excessive, or unreasonable amounts from certain of the 2007-2008
3 policies that do not exhaust those policies' limits of liability. (FAC, ¶¶ 116-124,
4 134-35.) IndyMac MBS also seeks determinations that claims asserted by others are
5 covered by the 2008-2009 policies even though IndyMac MBS has submitted no
6 claims under the 2008-2009 policies. (FAC, ¶¶ 94-115.) IndyMac MBS also seeks
7 declarations under both the 2007-2008 and 2008-2009 policies with respect to nine
8 underlying matters to which it is not a party – and for which, accordingly, it does not
9 seek insurance coverage. (FAC, ¶¶ 93-115, 125-133.) IndyMac MBS contends, and
10 seeks declarations, that many of these underlying matters are not covered under any
11 of the policies. (FAC, ¶¶ 95, 99, 103, 107, 111.) IndyMac MBS never alleges that
12 it has satisfied the \$2.5 million retention applicable to it under the policies or that
13 the exhaustion of such retention is imminent.

14 IndyMac MBS alleges that National Union issued policy number 966-82-76
15 to Named Insured IndyMac Bancorp, Inc. effective March 1, 2007 to March 1, 2008,
16 with limits of \$10 million excess of \$30 million of underlying limits (the “National
17 Union Policy”). (Carner Decl., Ex. 1, p. 71(FAC, ¶ 52d., Exhibit D).) IndyMac
18 MBS never alleges that the \$30 million in limits underlying the policy issued by
19 National Union have been paid for covered “Loss” as that term is defined in the
20 National Union Policy.

21 For the reasons stated below, this action should be dismissed for want of
22 subject matter jurisdiction, because IndyMac MBS lacks standing to obtain the
23 declaratory relief it requests against National Union.²

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27 ² There are a variety of additional reasons why IndyMac MBS's allegations
28 and claims are baseless on the merits, but for purposes of this motion, National
Union focuses solely on threshold jurisdictional defects in IndyMac MBS's
complaint.

1
2 **II. ARGUMENT**

3 **A. There is No “Case or Controversy” Between IndyMac MBS and**
4 **National Union.**

5 This action should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of an
6 Article III “Case or Controversy.” (*See Rhoades v. Avon Prods., Inc.*, 504 F.3d
7 1151, 1157 (9th Cir. 2007) (“in a declaratory relief action, ... a true ‘case or
8 controversy’ is required to withstand a Rule 12(b)(1) motion for lack of
9 jurisdiction”) (quoting *Fleck & Assocs., Inc. v. Phoenix, An Arizona Mun. Corp.*,
10 471 F.3d 1100, 1103-04 (9th Cir. 2006)).)

11 To satisfy Article III’s case or controversy requirement, [a plaintiff]
12 must establish standing to sue. “[T]he irreducible constitutional
13 minimum of standing contains three elements”: the plaintiff must
14 demonstrate (1) an injury-in-fact, (2) causation, and (3) a likelihood
15 that the injury will be redressed by a decision in the plaintiff’s favor.
16 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119
17 L.Ed.2d 351 (1992). Because the court’s role is “neither to issue
18 advisory opinions nor to declare rights in hypothetical cases,” the case
19 or controversy standard also requires that a claim be ripe for review.
20 *Thomas [v. Anchorage Equal Rights Comm’n]*, 220 F.3d [1134,] 1138
21 [9th Cir. 2000] (en banc)] (“The constitutional component of the
22 ripeness inquiry is often treated under the rubric of standing....”).
23 (*Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir.
24 2010).) The standing requirement also calls upon the courts to “satisfy themselves
25 that ‘the plaintiff has alleged such a personal stake in the outcome of the controversy
26 to warrant his invocation of federal-court jurisdiction.” (*Summers v. Earth Island*
27
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1 *Institute*, 129 S. Ct. 1142, 1149 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-
2 99 (1975) (Court’s emphasis)).³

3 IndyMac MBS’s lawsuit, which seeks a declaration of rights regarding the
4 2007-2008 and 2008-2009 policies, fails Article III’s standing requirements because
5 IndyMac MBS has no standing to request any declaration regarding these insurance
6 policies, let alone the 2007-2008 National Union Policy (4th tier excess), because it
7 has suffered no injury-in fact, as its claims are too contingent, remote, and
8 speculative.

9 **B. IndyMac MBS Has Suffered No “Injury In Fact” Implicating The**
10 **National Union Policy.**

11 IndyMac MBS has no standing to seek a declaration under the National Union
12 Policy because it has not suffered any “injury-in-fact,” which is one of the essential
13 elements of an Article III “Case or Controversy.” To demonstrate ‘injury-in-fact’, a
14 plaintiff “must show that he is under threat of suffering ‘injury in fact’ that is
15 concrete and particularized” and “actual and imminent, not conjectural or
16 hypothetical.” (*Summers*, 129 S. Ct. at 1149 (2009); *see also Lujan*, 504 U.S. at 560
17 (plaintiff must show “actual or imminent” harm to a “legally protected interest”).)⁴

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19
20 ³ Rule 12(b)(1) jurisdictional attacks can be either “facial” or “factual” – with facial
21 attacks being confined to the allegations. (*White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
22 2000).) “With a factual Rule 12 (b)(1) attack, however, a court may look beyond the
23 complaint to matters of public record without having to covert the motion into one for
24 summary judgment... It also need not presume the truthfulness of the plaintiffs’
25 allegations.” (*Id.* at 1242 (citation omitted); *see also Fed. Election Comm’n v. Adams*, 558
F. Supp.2d 982, 987 (C.D. Cal. 2008) (court “may review any evidence, such as affidavits
and testimony,” on Rule 12(b)(1) motion) (quoting *McCarthy v. United States*, 850 F.2d
558, 560 (9th Cir. 1988)).) “The party invoking federal jurisdiction” – IndyMac MBS here
– “bears the burden of establishing the [] elements” of standing. (*Lujan*, 504 U.S. at 561;
see FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990).)

26 ⁴ This inquiry is closely related to the Article III question of ripeness: “The
27 constitutional component of the ripeness inquiry is often treated under the rubric of
28 standing and, in many cases, ripeness coincides squarely with standing’s injury in fact
prong... Indeed, because the focus of our ripeness can be characterized as standing on a
timeline.” (*Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir.
2000) (citing *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)).)

1 IndyMac MBS's FAC lacks this essential requirement because it alleges no
2 "actual or imminent" injury. To the contrary, the insurance coverage in the 2007-
3 2008 policies is subject to an uninsured retention of \$2.5 million, and applies only to
4 Loss "in excess of the applicable Retention..." (See FAC Ex. A, Clause IV.A; see
5 also *id.*, Insuring Clause I.C.) IndyMac MBS has not alleged that this retention has
6 been exhausted, or that such exhaustion is even imminent. Indeed, it appears that
7 IndyMac MBS is not close to depleting the \$2.5 million retention amount. In a
8 letter date April 6, 2011, IndyMac MBS's counsel, William R. Stein, stated that
9 "IndyMac MBS has not yet incurred \$2,500,000 in Loss under the Policy," noting
10 that IndyMac MBS "had incurred over "500,000" through November 2010. (See
11 Declaration of Theodore A. Boundas, Exhibit 2, [Docket No. 28].) In addition,
12 there is no allegation that any of the policies with limits underlying the National
13 Union Policy are exhausted by payments of covered "Loss" as that term is defined
14 in the National Union Policy.

15 "The party invoking federal jurisdiction bears the burden of establishing the[]
16 elements" of standing – including an injury in fact that is "actual and imminent" and
17 not "conjectural or hypothetical." (See *Lujan*, 504 U.S. at 560, 561; *FW/PBS, Inc. v.*
18 *Dallas*, 493 U.S. 215, 231 (1990); *Summers*, 129 S. Ct. at 1149.) Because IndyMac
19 MBS has not established that it has exhausted the uninsured retention of \$2.5
20 million, or that such exhaustion is imminent, IndyMac MBS has failed to establish
21 an Article III Case or Controversy with respect to its request for declaratory relief
22 under the fourth tier 2007-2008 excess National Union Policy with limits of \$10
23 million excess of \$30 million. National Union did not issue a policy for the 2008-
24 2009 policy period.

25 This principle has been illustrated by a number of courts in analogous
26 situations. For example, in *Laguna Publishing Co. v. Employers Reinsurance*
27 *Corp.*, 617 F. Supp. 271 (C.D. Cal. 1985), the court concluded that a declaratory
28

1 judgment action brought against an insurer that provided an excess layer of coverage
 2 did not satisfy the “actual controversy” requirements of the Constitution and the
 3 federal judicial code when the complaint did not allege that the plaintiff has
 4 exhausted the primary coverage. As the court explained, this action was not
 5 justiciable because the “question of [the excess carrier’s] liability to Laguna may
 6 never become an issue at all... Until [the primary carrier’s] liability under the
 7 primary policy is settled, the Court cannot be certain that a controversy will arise
 8 between” the insured and the carrier that provided excess coverage. (*Id.* at 273.)
 9 Similarly, in *Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500 (9th Cir. 1994), the
 10 Ninth Circuit Court of Appeals held that it was not proper to bring a declaratory
 11 judgment action against a carrier that provided excess coverage until the plaintiff
 12 had established that the excess coverage will be triggered. (*Id.* at 1505.) This is true
 13 even if it is attempting to “sue all insurers in order to make a comprehensive
 14 determination of coverage.” (*Id.* at 1504.)⁵

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 21 ⁵ *Iolab* was decided under California law. Since then, some courts have questioned
 22 whether California law requires that the primary coverage in fact be exhausted before a
 23 declaratory judgment action can be brought against a carrier that provided excess
 24 coverage. But even those cases hold that California law requires that the plaintiff “alleges
 25 a loss that exceeds the primary coverage.” (*Fremont Reorganizing Corp., v. Federal Ins.*
 26 *Co.*, 2010 WL 444718, *4 (C.D. Cal. 2010).) Here IndyMac MBS has not even satisfied
 27 that loose standard, assuming *arguendo*, that it is a correct statement of California law.
 28 Moreover, irrespective of California law, a federal court being asked to issue a declaratory
 judgment is bound by strict federal standards of jurisdiction and justiciability. (*Colapinto*
v. Esquire Deposition Serv., LLC, 2011 WL 913251, *3 (C.D. Cal. 2011) (“This Court,
 however, must apply federal law in determining Plaintiff’s standing because ‘standing to
 sue in any Article III court is a federal question which does not depend on the party’s prior
 standing in state court’; rejecting argument that plaintiff would have standing under
 California law).) As noted above, in *Laguna Publishing*, the court decided there was no
 standing under the “actual case or controversy” requirements of federal law when primary
 coverage had not been established or exhausted.

1 **III. CONCLUSION**

2 For the foregoing reasons, National Union hereby respectfully requests that
3 this Court dismiss this action against it for want of subject matter jurisdiction.

4 Dated: June 13, 2011

WAXLER ♦ CARNER ♦ BRODSKY LLP

5
6
7 By: 

8 ANDREW J. WAXLER

GRETCHEN S. CARNER

Attorneys for Defendant

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PROOF OF SERVICE

1 STATE OF CALIFORNIA)
 2 COUNTY OF LOS ANGELES)

3 I am employed in Los Angeles County. My business address is 1960 E. Grand Avenue,
 4 Suite 1210, El Segundo, California 90245, where this mailing occurred. I am over the age of 18
 5 years and am not a party to this cause. I am readily familiar with the practices of
 6 WAXLER♦CARNER♦BRODSKY LLP for collection and processing of correspondence for
 7 mailing with the United States Postal Service. Such correspondence is deposited with the United
 8 States Postal Service the same day in the ordinary course of business.

9 On June 14, 2011, I served the foregoing documents on the interested parties in this action
 10 entitled as follows:

11 **(1) NOTICE OF MOTION AND MOTION TO DISMISS;**
 12 **(2) MEMORANDUM OF POINTS AND AUTHORITIES**

13 [XX] by placing [] the original [X] true copies thereof enclosed in sealed envelopes addressed as
 14 follows:

15 **SEE ATTACHED PROOF OF SERVICE LIST**

16 [XX] **(BY MAIL)** I placed such envelope for collection and mailing on this date
 17 following ordinary business practices.

18 [] **(BY PERSONAL SERVICE)** I caused to be hand delivered such envelope to the
 19 addressee so indicated.

20 [XX] **(BY THE COURT'S ECF SYSTEM):** I caused each such document(s) to be transmitted
 21 electronically by posting such document electronically to the ECF website of the United
 22 States District Court for the Central District of California, on all ECF-registered parties in
 23 the action.

24 [] **(BY FEDERAL EXPRESS)** I am "readily familiar with the firm's practice of
 25 collection and processing correspondence for mailing via Express Mail (or another method
 26 of delivery providing for overnight delivery pursuant to C.C.P. § 1005(b)). Under that
 27 practice, it would be deposited with the United States Postal Service or other overnight
 28 delivery carrier (in this case, Federal Express) on that same day with postage thereon fully
 prepaid at El Segundo, California in the ordinary course of business.

[] **(BY FACSIMILE)** I caused to be served, via facsimile, the above-entitled
 document(s) to the office of the addressee so indicated.

[XX] **(STATE)** I declare under penalty of perjury that the foregoing is true and correct.

[] **(FEDERAL)** I declare that I am employed in the office of a member of the bar of
 this court at whose direction the services was made.

Executed on June 14, 2011, at El Segundo, California.


 CELIA FLIPPIN

SERVICE LIST

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 United States District Court Case No. CV11-2950-RGK and CV11-2998-RGK

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